Supreme Court, U.S.
FILED
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No. 97-421

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

GRAND LOCKWOOD PARTNERS
LIMITED PARTNERSHIP,

Petitioner,

v.

MAXWELL HOUSE COFFEE COMPANY,
KRAFT GENERAL FOODS, INC.,
VISTA CHEMICAL COMPANY, ENTERPLAST, INC.,
and H. MUEHLSTEIN & CO., INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS MAXWELL HOUSE COFFEE COMPANY, KRAFT GENERAL FOODS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED

1. May a party who fails to file a notice of appeal benefit from a reversal upon remand of the case?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit include:

1. Petitioner, Grand Lockwood Partners Limited Partnership;
2. Maxwell House Coffee Company, Respondent;
3. Kraft General Foods, Inc., Respondent; Kraft is a wholly owned subsidiary of Philip Morris, Inc. which is not a party to this case.
4. Vista Chemical Company, Respondent;
5. Enterplast, Inc., Respondent; and
6. H. Muehlstein & Co., Inc., Respondent.

Other than as noted, none of the parties has a parent company or nonwholly owned subsidiary involved in this matter.

TO THE HONORABLE SUPREME COURT:

The Respondents Maxwell House Coffee Company, Kraft General Foods, Inc. respectfully request that this court deny the Petition for Writ of Certiorari submitted by the Petitioner.

COUNTERSTATEMENT OF THE CASE

*At the outset of this brief Respondent represents to the Court that the response contained herein does not address the issues and arguments presented by Petitioner for the reason that Respondent does not believe that the question raised presents an issue properly before this Court. The response contained herein is intended to point out why the issue is not proper for this Court to consider and a grant of certiorari would be inappropriate in this case irrespective of the law in the various Courts of Appeals on the question suggested by Petitioner.

Respondents agree that this case arises from an interpleader action filed pursuant to 28 U.S.C. §1335, but would show the Court that the sole question presented, i.e., whether parties who fail to meet the jurisdictional notice of appeal requirement can benefit from a reversal has no bearing on the issues presented to the Court of Appeals. This matter is not ripe for decision by this court, and to the extent that the Petition for Certiorari seeks such an opinion at this time it is seeking an advisory opinion.

The statement of the case filed by Petitioners misstates the role of the insurer, Marine Indemnity Co.,

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*Both Petitioner and Respondent filed appendices with their briefs. References to Petitioner's Appendix cited herein will be identified as (App. ___). References to Respondent's Appendix will be identified as (R. App. ___).

(Marine) in that Marine, which tendered its available policy proceeds into the registry of the court in connection with the action in interpleader, did not insure the warehouse itself, but rather insured only certain contents within the warehouse owned by certain parties, as well as cleanup and debris removal expenses incurred by the named insured, Lockwood Storage and Warehouse.

In its decision as to how the interpled funds would be distributed among the various claimants, the district court determined the fact that the amount of interpled funds was inadequate to cover the claims against the policy proceeds, which the court found to be valid, and therefore the district court made a determination of priority of coverage. (App. 71a) That determination of priority and subsequent finding resulted in an award of 12.42% of the interpled funds to Petitioner for debris removal and clean up expense, which was challenged on appeal. The sole issue raised on the appeal in the Fifth Circuit by Respondents Maxwell House/Kraft was a challenge to the total award by the district court of any of the interpled funds to Petitioner. (R. App. 19a)

In its opinion reversing the district court, the Court of Appeals concluded that Petitioner had failed to meet its burden of proof in establishing that it was an intended beneficiary under the debris removal and cleanup portions of the Marine policy and for that reason the judgment of the district court awarding funds to Petitioner was reversed. (App. 15a) That finding by the Court of Appeals has not been challenged by Petitioner in this proceeding. The effect of that reversal was to require a return of the policy proceeds to the district court by Petitioner subject to further proceedings in the district court.

The Petition for Writ of Certiorari states that Respondent Maxwell House/Kraft filed its Notice of Appeal in the Court of Appeals complaining of the award to Petitioner and seeking for Respondent Maxwell House/Kraft a higher award. Although it is a necessary corollary to a reversal of the award to Petitioner that there would be more funds to distribute among claimants, the focus of the Appeal and the issues addressed in the Appellant's brief submitted by Respondent Maxwell House/Kraft was the award of *any* interpled funds to Petitioner. (R. App. 19a)

ARGUMENT IN OPPOSITION TO CERTIORARI

I. THE ISSUE RAISED BY THE PETITIONER IS NOT JUSTICIABLE.

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, FEDERAL COURTS 34 (1963). "[N]o justiciable controversy is presented. . . when the parties are asking for an advisory opinion. . . ." *Id.* at 95. The Fifth Circuit remanded this action to the district court for the district court to redistribute the funds improperly paid to the Petitioner. The district court has at this time made no additional award to the nonappealing parties. Until such time as the district court awards any funds to nonappealing parties, Petitioner has no basis to complain, assuming, arguendo, that it would have standing to complain. Furthermore, if the district court errs in its allocation of the funds, any appeal would be to the Fifth Circuit, not to this Court. The Petitioner seeks an advisory opinion to guide the district court in its allocation of the interpled funds. This is not a proper basis for granting certiorari.

II. PETITIONER HAS NO STANDING TO APPEAL THE QUESTION PRESENTED.

The appeal to the Fifth Circuit by Respondent Maxwell House/Kraft challenged the district court's award of any funds to Petitioner based on Petitioner's failure to prove a right to recover under the Marine policy. (R. App. 19a) A challenge to the totality of that award did not require an appeal by all parties.[1] The finding of the Court of Appeals sustained Respondent Maxwell House/Kraft's challenge to the award of any funds to Petitioner. (App. 15a) Any issue concerning reallocation of the funds returned to the district court by Petitioner among the parties to the interpleader was secondary to the challenge of the award of any funds to Petitioner and not an issue that the Court of Appeals needed to address in resolving the appellate issues presented to the court by Respondent Maxwell House/Kraft's appeal. The Court of Appeals' opinion concluded that Petitioner was not entitled to any policy proceeds. That finding is final and has not been challenged in the Petition for Writ of Certiorari. Having waived its right to appeal the Fifth Circuit finding on the merits that it was not entitled to any proceeds of the interpleader, Petitioner has no stand-

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[1] The Special Master's Report and Recommendation (App. E) and the Errata Sheet Supplementing the Special Master's Report and Recommendation (App. G) in the district court, which was adopted as the opinion of the district court (App. 31a) found that Kraft's uninsured damages were $995,000 after applying the Marina Indemnity deductible. (App. 76a) The trial court awarded Kraft 33.72% of the $1,275,610.00 which had been interpled, or $430,135.70 plus interest (App. 20a, 82a). Thus, if the district court allocated all of the funds to Kraft that had previously been awarded to Petitioner, $158,430.76 plus interest (App. 21a, 83a), Kraft would still have sustained an uninsured loss of $411,433.54. Thus, the question of who appealed and who did not is immaterial as it relates to possible action by the district court following remand.

ing to seek by way of a Petition for Writ of Certiorari a ruling from this Court that would direct the district court as to how it should decide an essentially equitable proceeding. (App. 50a) *See Flast,* 392 U.S. at 95.

III. PETITIONER IS ATTEMPTING AN IMPROPER COLLATERAL ATTACK ON THE FIFTH CIRCUIT'S RULING.

The Petitioner seeks to circumvent the effect of the Fifth Circuit ruling on a point which it did not and could not otherwise appeal to this Court. Under the guise of a question regarding the rights of nonappealing parties, the Petitioner is implicitly attacking the Fifth Circuit ruling that it has no right to retain the funds awarded to it by the trial court, a point which it has not otherwise appealed to this Court. That type of review is not within the purview of a Petition for Writ of Certiorari and since Petitioner has no standing to complain about how the funds are reallocated by the district court, Petitioner also has no standing to seek a review in this Court or to present issues concerning the status of appealing versus nonappealing parties when there has been no decision relating to that issue by any lower court for consideration on appeal.

CONCLUSION

Certiorari is not warranted. For the reasons set forth above, Respondents Maxwell House/Kraft respectfully request that this court deny the Petition for Writ of Certiorari.

Respectfully submitted,

SLOAN B. BLAIR
JOHN C. HART
BRUCE H. ROGERS
Attorneys for Respondents.

RESPONDENT'S APPENDIX

**[Brief of Appellants in
U.S. Court of Appeals for the Fifth Circuit]**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20441

MARINE INDEMNITY INSURANCE
COMPANY OF AMERICA

Plaintiff

v.

LOCKWOOD WAREHOUSE & STORAGE, ET AL

Defendants

MAXWELL HOUSE COFFEE COMPANY;
KRAFT GENERAL FOODS INC.

Defendants - Appellants

v.

KRAFT GENERAL FOODS INC; GRAND LOCKWOOD
PARTNERS LIMITED PARTNERSHIP; THIRD COAST
PACKAGING; IGI BAYCHEM, INC, OXID, INC;
R D A INTERNATIONAL, INC; PHILIP WERNER;
VISTA CHEMICAL

Defendants - Appellees

v.

ENTERPLAST, INC; H MUEHLSTEIN & CO

Intervenor Defendants - Appellants

Appeal From Final Judgment Entered By
The U.S. District Court for the
Southern District of Texas Civil No. 94-CV-2430

BRIEF OF APPELLANTS MAXWELL HOUSE COFFEE COMPANY AND KRAFT GENERAL FOODS, INC. FOR THE ACCOUNT OF THEIR DEDUCTIBLE UNINSURED INTEREST

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COMPANY AND KRAFT
GENERAL FOODS, INC.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20441

MARINE INDEMNITY INSURANCE
COMPANY OF AMERICA

Plaintiff

v.

LOCKWOOD WAREHOUSE & STORAGE, ET AL

Defendants

MAXWELL HOUSE COFFEE COMPANY;
KRAFT GENERAL FOODS INC.

Defendants - Appellants

v.

KRAFT GENERAL FOODS INC; GRAND LOCKWOOD
PARTNERS LIMITED PARTNERSHIP; THIRD COAST
PACKAGING; IGI BAYCHEM, INC, OXID, INC;
R D A INTERNATIONAL, INC; PHILIP WERNER;
VISTA CHEMICAL

Defendants - Appellees

v.

ENTERPLAST, INC; H MUEHLSTEIN & CO

Intervenor Defendants - Appellants

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellants Maxwell House Coffee Company and Kraft General Foods, Inc. for the account of their deductible uninsured interests certifies that the following listed persons and other entities are financially interested in the outcome of this litigation. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

A. Named Parties:

1. Atlantic International Commodities, Inc.
2. Citation Sales & Marketing, Inc.
3. William Lance Cowan d/b/a Shippers International
4. Custom Form Transportation Systems, Inc.
5. CXI, Inc.
6. Michael L. Durham, P.C.
7. Michael L. Durham
8. Enterplast, Inc.
9. The Fritz Companies, Inc.
10. Grand Lockwood Partners Limited Partnership
11. IGI Baychem, Inc.
12. Integrated Laboratory, Furniture & Equipment
13. Kraft General Foods, Inc.
14. Lockwood Corporation
15. Maxwell House Coffee Company Division of Kraft General Foods, Inc.
16. H. Muehlstein & Co., Inc.
17. Oxid, Inc.
18. Philip Morris Companies Inc.
19. Phoenician Enterprises, Inc.
20. R.D.A. Trading, Inc.
21. Simpson Paper Co.

22. Simpson Pasadena Paper Co.
23. Snavely Forest Products, Inc.
24. Third Coast Packaging, Inc.
25. Ultra Warehouse, Inc.
26. Vista Chemical Company

B. Counsel for the Interested Parties:
1. Richard E. Anderson.
2. Mark W. Stevens.
3. Larry J. Goldman and Jason R. Cliffe of the law firm of Davis, Adami & Cedillo, Inc.
4. Paul J. Coselli and Allan R. Lazor of the law firm of Coselli and Lazor.
5. Steven P. Vangel and Robert G. Moll of the law firm of Hill, Rivkins, Loesberg, O'Brien, Mulroy & Hayden.
6. Robert C. Oliver of the law firm of Sharpe & Kajander.
7. Robert L. Ketchand of the law firm of Short & Ketchand, L.L.P.
8. Hal R. Gordon and Paul M. Gordon of the law firm of Gordon & Gordon.
9. Philip Werner and Mary Thompson of the law firm of Hohmann, Werner & Taube, L.L.P.
10. John C. Hart, John C. Stewart, Sandra C. Liser, and Sloan Blair of the law firm of Cantey & Hanger, L.L.P.
11, David F. Chappell of the law firm of Chappell & McGartland, L.L.P.
12. Dale R. Mellencamp of the law firm of Gilpin, Paxson & Bersch, L.L.P.
13. Robert L. Levy, Timothy McInturf and Michael T. Powell of the law firm of Haynes & Boone, L.L.P.
14. Mark J. Airola

15. William H. Seele and James M. Davin of the law firm of Julian & Seele, P.C.
16. Michael R. Tibbets and Stephen C. Reid, III, of the law firm of DeLange, Hudspeth and Pitman, L.L.P.
17. James R. Koecher, of the law firm of Brown, Sims, Wise & White, P.C.

C. Insurance Interests of the Various Parties Known to the Undersigned:

Aetna Insurance Company
American Home Assurance Company
Arkwright Mutual Insurance Company
Fidelity & Casualty Company of New York
Home Indemnity Company
Intercargo Insurance Company
William H. McGee & Co., Inc.
Northbrook Property and Casualty Company
Phoenix Assurance Company of New York
Reliance Insurance Company of Illinois
Lexington Insurance Company
Certain Underwriters at Lloyds, London

/s/ John C. Hart
John C. Hart
Attorney of Record for
Defendants/Appellants

STATEMENT REGARDING ORAL ARGUMENT

The appeal by these appellants challenges the district court's interpretation of the scope of coverage provided under an insurance contract as it relates solely to the claim of Grand Lockwood Partners Limited Partnership for clean up and debris removal expenses. We believe that the errors asserted and the relief sought can be readily discerned from this brief and the record, and that oral argument would not be of additional benefit to the Court. However, if the Court grants oral argument in response to a request by any other party to this portion of the appeal, Appellants Maxwell House Coffee Company and Kraft General Foods, Inc. would request an opportunity to present oral argument on this issue.

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ARGUMENT. . . . . .

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B. The Interpled Proceedings of the Marine Policy Should be Applied First to Pay for Damage to Insured Personal Property, and Only After Claims for Insured Personal Property Damage have been Satisfied, Should Any Remaining Policy Proceeds be Paid for Clean Up and/or Debris Removal Expense . . . . . .

C. The Evidence Presented to the Trial Court Did Not Contain Any Proof that the Condition Precedent in the Policy, Requiring Notice by the Insured of Intent to Claim for Debris Removal Expense, was Satisfied .....

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Harwell v. State Farm Mut. Auto. Ins. Co., 876 S.W.2d 494, 498 (Tex. App. – Fort Worth 1994), aff'd., 896 S.W.2d 170 (Tex. 1995) .....

Henry v. American Concept Ins. Co., 498 N.W.2d 657, 660 (S.D., 1993) .....

In re The Kelly Group, Inc., 159 B.R. 472, 476 (W.D. Va. 1993) .....

Lockette v. Greyhound Lines, Inc., 817 F.2d 1182, 1185 (5th Cir. 1987) .....

Midland Ins. Co. v. Friedgood, 577 F. Supp. 1407, 1411 (S.D.N.Y. 1984) .....

Smart v. Tower Land & Inv. Co., 597 S.W.2d 333, 337 (Tex. 1980) .....

Statutes:

28 U.S.C. §1291 .....

STATEMENT OF APPELLATE JURISDICTION

The United States Court of Appeals for the Fifth Circuit has jurisdiction over this appeal under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

Lockwood Warehouse and Storage ("Lockwood") was the sole tenant and operator of a warehouse operation in a building (the "Building") it leased from the Building owner, Grand Lockwood Partners Limited Partnership (the "Partnership"). Lockwood purchased an Inland Transit Floater property insurance policy (the "Policy") from Marine Indemnity Insurance Company of America ("Marine Indemnity"). The Policy provided insurance for certain property stored by Lockwood or its warehouse "tenants" within the Building. On November 8, 1993, a fire occurred which destroyed the building and all of its contents. Claims were made against Lockwood and Marine Indemnity by various entities who had personal property stored in the building for the value of damaged property far in excess of the policy limits.

This case involves an interpleader action filed in the district court by Marine Indemnity in which Marine Indemnity tendered its policy limits, which Marine Indemnity agreed were payable, into the registry of the court so the court could resolve the conflicting claims of various companies who claimed damage to their property from the fire, companies whose personal property destroyed in the fire far exceeded the limits of the Policy. In contrast to the claims of various entities generally referred to as the "tenants" for damage to their personal property, some of which was insured under the Policy, the Partnership, the owner of the Building, sought to recover expenses for clean up and removal of all the

debris from the Building after the fire. Of the policy proceeds tendered with the court in the amount of $1,275,610.00, the final judgment allocated 87.58%, of the tendered amount, or $1,117,179.24 plus accrued interest, to the "tenants" for damages to personal property in the amount of $2,671,947.95, the amount the trial court found represented uninsured losses for damaged personal property insured under the Policy. $158,-430.76 plus accrued interest was awarded to the Partnership, for either clean up or debris removal expenses. Appellants Maxwell House and Kraft, on behalf of their $1,000,000 deductible uninsured loss, objected to the trial court's award of any amount to the Partnership and appeal the award by the trial court of any of the interpled funds to the Partnership.

The issues presented in this appeal are whether the Partnership was entitled to any award under the Policy for clean up or debris removal expenses that it incurred because:

I. The Policy only extended coverage for clean up and debris removal expenses, if at all, for those expenses incurred by the Insured, Lockwood.

II. No recovery should have been allowed for clean up and debris removal expenses until all claims for damaged property were satisfied;

III. No evidence was offered that the named insured, Lockwood, satisfied the condition precedent to recovery for debris removal or clean up costs, which required the Insured, Lockwood, to give notice to the underwriters of Lockwood's intent to claim for such cost no later than 12 months after the date of loss; and

IV. The Partnership failed to offer evidence that the debris removal expense it incurred was specifically related to the removal of property insured under the Policy for which recovery was allowed as opposed to the removal of debris of personal property which the district court found to be property not insured under the policy.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below.

This appeal arises from the final judgment in an interpleader action filed by Marine Indemnity. Marine Indemnity issued an Inland Transit Floater property insurance policy to Lockwood which insured personal property of Lockwood and personal property of others directly connected to Lockwood's business; in Lockwood's care, custody or control; and for which Lockwood was responsible, or which Lockwood had agreed in writing to insure prior to loss. The Policy is included in the Record Excerpts at Tab 10.[1] By its manuscript terms, the Policy specifically stated that it did not provide coverage to Real Property of the Insured. (Rec. Ex. Tab. 10 p. 21). On November 8, 1993, fire destroyed the Building and all of the personal property contained therein. (Rec. Ex. Tab 2 p. 2091). This resulted in multiple, conflicting claims under the Policy for amounts far in excess of the coverage limits of the Policy. (*Id.*) The uninsured losses for damage to personal property of businesses which had stored goods with Lockwood was $2,671,947.95. (Rec.

[1] The pages of the Policy which Kraft believes are most relevant to the issues in this appeal are attached hereto as an Appendix to this Brief.

Ex. Tab 2 pp. 2043-2045). In addition, damage to other personal property in the building which in some instances was covered by other insurance companies was $14,900,-705.55. (Rec. Ex. Tab 2 pp. 2086-2075). Over and above the claims for damage to personal property was a single claim of the Partnership, the Building owner, for debris removal expenses.[2] (Rec. Ex. Tab 2 p. 2074).

In the district court's final judgment, Kraft General Foods, Inc., on behalf of itself and its Maxwell House Coffee Company Division (collectively "Kraft") was awarded a portion of the interpled fund for its uninsured deductible interest, (Rec. Ex. Tab 5 p. 2215), but far less than the total uninsured loss sustained by Kraft. (Rec. Ex. Tab 2 p. 2045). Kraft received approximately 41.6% of its uninsured loss plus accrued interest on that amount, based on the trial court's allocation of policy proceeds. The district court also awarded 12.42%, or $158,430.76 plus interest, of the interpled funds to the Partnership for the Partnership's claim for expenses incurred by the Partnership in removing debris of damaged personal property from the Building site after the fire. (Rec. Ex. Tab 5 p. 2214). Unlike all other claimants under the Policy, the Partnership had no property stored within the Building, did not claim through the Insured (Lockwood), and the amount of the value of its claim did not originate from stated or reported values. (*See generally* Rec.). Rather, the Partnership was the owner of the Building and Lockwood's landlord. (Rec. Ex. Tab 2 p.

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[2]The trial court and brief's of counsel for the Partnership refer to the claim as one for "clean up costs and debris removal expenses." In fact, as will be shown hereinafter, there was no evidence offered for clean up costs and the only expenses proven up were for debris removal. For that reason, Appellants refers only to debris removal in this brief.

2091). The Partnership brought its claim when Lockwood allegedly failed or refused to clean up the Building site and remove the debris from the fire after Lockwood terminated its lease with the Partnership following the fire. (Rec. Ex. Tab 11 p. 1506).

The district court appointed Magistrate Frances Stacy to act as a master to consider the issues of insurable interest, calculation of damages, and priority of claims. (Rec. Vol. 7, p. 602). The claimants presented the master with oral and/or written testimony evidencing both the nature and scope of their claims and briefed their positions on the issues submitted to the master. (*See generally* Rec.). On January 2, 1996, the master issued her report and recommendation, wherein, among other things, she found that the Partnership was entitled to a share of the interpled fund which she stated, at that time, to be based upon the Debris Removal Clause contained on page 6 of the Policy. (Rec. Ex. Tab 2 p. 2051). That finding diminished the pool of insurance funds available to cover damaged insured personal property by the amount of the award to the Partnership.

Kraft objected to the master's finding with respect to the award to the Partnership, asserting that: (1) the Debris Removal Clause of the Policy did not cover the Partnership's expenses because the Partnership was not an insured under the Policy (Rec. Vol. 2, p. 2137); (2) the Debris Removal Clause of the Policy did not cover the Partnership's expenses because the expenses were not incurred by Lockwood, the Insured; (Rec. Vol. 2, p. 2147); (3) the Partnership's claim was based on Lockwood's refusal to comply with the provisions of the lease agreement between the Partnership and Lockwood after the lease had been terminated and thus was a claim for breach of contract and not covered by the Policy (Rec.

Vol. 2, p. 2146); (4) the Partnership's proof was defective because it claimed the entire cost for removal of debris of all damaged personal property whether insured under the policy or not, and its costs were not limited to nor segregated between the cost of removal for debris of personal property insured and personal property which was not insured (*Id.*); and (5) Lockwood had already released any claims against the Policy for debris removal expenses (Rec. Vol. 2, p. 2137).

On March 4, 1996, the District Court entered a Memorandum Opinion and Order and its Final judgment. (Rec. Ex. Tab 4 pp. 2205-13). In its Memorandum Opinion and Order, the district court adopted the Master's findings of fact and also ruled for the first time that the Pollution Endorsement to the Policy was the basis for its finding of coverage for the Partnership's claim for debris removal expenses without reversing the finding of the Master concerning the Debris Removal Clause in the main body of the Policy. (Rec. Ex. Tab 4 p. 2208). It is from this award to a party whom Kraft regards as a stranger to the policy that Kraft appeals.

B. Statement of Facts.

The Partnership owned the Building and leased it to Lockwood under a written lease agreement. (Rec. Ex. Tab 2 p. 2086). Lockwood operated a warehouse on the leased premises, (*Id.*), and purchased insurance for certain classes of personal property under the Policy issued by Marine Indemnity (Rec. Ex. Tab 10 pp. 6-25). The Policy provided coverage for, among other things, "Personal Property of others [i.e. not the named insured] which [was] directly connected with the Insured's business while in the care, custody or control of the Insured and for which the Insured [was] responsible, or for which the Insured [had] agreed in writing prior to loss to

insure."(Appendix 1 p. 2; Rec. Ex. Tab 10 p. 24). The Building and the personal property of Lockwood and of the businesses which had entrusted their property to Lockwood, or which Lockwood agreed to insure, were destroyed by fire. (Rec. Ex. Tab 2 p. 2021). The Policy limits of coverage were insufficient to cover the value of all of the personal property insured under the policy. (*Id.*) The total value of the personal property destroyed in the Building by the fire was $17,572,653. (Rec. Ex. Tab 2 pp. 2074-86). The trial court found that coverage existed under the Policy for goods destroyed and expenses incurred in the amount of $3,050,947.95, (Rec. Ex. Tab 3 pp. 2095-97), or just over 17% of the total value of personal property destroyed in the fire. This amount includes $379,000.00 for debris removal expenses incurred by the Partnership. (Rec. Ex. Tab 3 p. 2196). Thus, of the $17,572,653 of personal property destroyed in the fire, only $2,671,947.95 was found by the Magistrate to be a compensable loss under the Policy.

The district court held that the property of a number of claimants was not insured under the Policy. As to the claimants who received an award under the policy, only a portion of their damaged personal property (that portion not otherwise insured) was included in calculating the percentage of award from the policy proceeds. (Rec. Ex. Tab 2 pp. 2049-51). In contrast, the Partnership's claim against the Policy was for the entire cost of removal of the debris of the property stored in the warehouse incurred by the Partnership. (Rec. Ex. Tab 11 pp. 1505-06). The Partnership claimed that it requested that Lockwood remove the debris of the fire from the Building site, but Lockwood refused. (Rec. Ex. Tab 11 p. 1506). The Partnership asserted that it subsequently did so at its own expense. (*Id.*) The evidence presented by the Partnership

in support of its claim lists $384,000.00 as the cost of debris removal for all personal property at the Building, and does not segregate the cost of removing debris of property insured under the Policy. (Rec. Ex. Tab 11, p. 1505).

The Affidavit of Martin Leibowitz, submitted on behalf of the Partnership, stated that the claim for $384,-000 submitted by the Partnership was for debris removal, with no reference to clean up cost. (*Id.*) His affidavit and that of John Cherry, the contractor who performed the debris removal, state that the $384,000 expense was for "the removal of the debris of the items stored in the warehouse." (Rec. Vol. 4 p. 1388). The total value of all the items destroyed in the warehouse was more than six and a half times the value of the property as to which the trial court determined was covered under the Policy.[3] However, the trial court based the award to the Partnership on 100% of the Partnership's claim for debris removal expense.

The subject of debris removal is addressed in two areas of the Policy: (1) in the Debris Removal Clause (Policy Clause 13, Appendix 1 p. 5; Rec. Ex. Tab 10 p. 19); and (2) in the Debris Removal and Cost of Clean Up Extension which was a part of the Pollution Endorsement to the Policy. (Appendix 1, p. 8; Rec. Ex. Tab 10 p. 10).

Among other things, the Debris Removal and Cost of Clean Up Extension in the Pollution Exclusion provides that:

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[3]The actual recovery allowed was only for a percentage of the claim in the raio that $3,050,947.95 (the total amount allowed by the Court) bears to $1,275,610 (the amount of funds tendered into the registry of the court).

1) It is subject to the other terms of the policy. "[T]his Policy (subject otherwise to its terms, conditions, and limitations, including but not limited to any applicable deductible) also insures, within the sum insured . . .". (Appendix 1 p. 8; Rec. Ex. Tab 10 p. 10).

2) There are two conditions precedent to recovery under this extension:

   a) "[the] Underwriters shall have paid or agreed to pay for direct physical loss or damage to the property insured hereunder unless such payment is precluded solely by the operation of any deductible; and

   b) that the Assured shall give notice to the Underwriters of intent to claim for cost removal of debris or cost of cleanup NO LATER THAN 12 MONTHS AFTER THE DATE OF SUCH PHYSICAL LOSS OR DAMAGE." (Appendix 1 p. 8; Rec. Ex. Tab 10 p. 10) (emphasis in original).

In its Complaint for Interpleader, Marine Indemnity acknowledged its obligation for direct damage to insured property and asked the Court for direction as to whom payment should be made and how much to each party. (Rec. Vol. 9 p. 27). Unlike all other claimants, the Partnership is not seeking the value of insured personal property destroyed in the fire. (*See generally* R.)

STATEMENT OF THE STANDARD OF REVIEW

The standard of review on Kraft's appeal is *de novo* on all issues presented. Kraft appeals from the magistrate's and the district court's conclusions of law concerning the coverage available to the Partnership under the Policy and whether the Partnership has carried its burden of proof in

the interpleader action. On appeal, a magistrate's conclusions of law, when adopted by the district court, as here, are considered as conclusions of the district court. *Lockette v. Greyhound Lines, Inc.*, 817 F.2d 1182, 1185 (5th Cir. 1987). A district court's conclusions of law are subject to de novo review on appeal. (*Id.*)

SUMMARY OF ARGUMENT

This appeal is predicated on the premise that the Partnership, as the owner of the Building, is an interloper which has no standing to make a claim against the interpled policy proceeds for the expenses it submitted in this claim.

The Partnership was not an intended beneficiary of the policy proceeds based upon a clear and simple reading of the policy language. Real property was not insured. The Partnership did not have any personal property for which it made a claim. The Debris Removal Clause only covered expenses incurred by the Insured. The Debris Removal Extension similarly covered only the Assured for clean up and debris removal expenses, subject to compliance with the conditions precedent in the policy and the policy limits.

Additionally, because the damage to personal property covered by the policy exceeds the policy limits, the clean up or debris removal expenses would not be compensable under the Policy because the Policy would only cover those expenses if there were an amount of coverage available after payment for damage to insured personal property. This conclusion is based upon the fact that the Debris Removal Clause states that it is specifically not intended to enlarge the policy limits. Further, there is a condition precedent to recovery for clean up

or debris removal under the Debris Removal Extension in the Pollution Endorsement requiring that the underwriters shall have paid or agreed to pay for direct physical loss or damage to the property insured under the policy. Logic would dictate that if the debris removal and clean up provision does not enlarge policy limits; if a condition precedent to debris removal recovery is payment or an agreement to pay for damage to insured property; and if the damage to insured property exceeds the policy limits; then debris removal and clean up expenses are not recoverable.

Furthermore, the Partnership's claim for debris removal expenses should fail because there is no evidence that Lockwood notified Marine Indemnity that it intended to make a claim for clean up and debris removal expenses under the Pollution Endorsement at any time, much less within 12 months after the fire. There is a complete failure of proof to demonstrate that this condition precedent of the policy was met. Thus, the Partnership's status is that of a stranger to the policy and its claim should have been disallowed.

Finally, even if the Court were to find that the Partnership is legitimately entitled to assert a claim, the Partnership should still not be entitled to recover the full amount awarded by the trial court because the evidence offered by the Partnership did not include any proof of "clean up" expenses and the only evidence of expense for debris removal submitted by the Partnership to the court was for removal of all debris in the building, including property not insured under the Policy, and for which the Policy would therefore not pay to remove. The Partnership failed to segregate debris removal for insured versus uninsured property. The trial court's award was errone-

ous as a matter of law and in the absence of specific proof within the policy cover, the Partnership's claim should be disallowed.

ARGUMENT

A. Only Clean Up and Debris Removal Expenses Incurred by the Insured (Lockwood) are Covered by the Policy.

The Policy contains two sections which address the subject of debris removal. The first, located in the main body of the policy, states, in part, "This policy is extended . . . to cover **the Insured's expenses** incurred in the removal of all debris of the property insured . . . ." (Appendix 1 p. 5; Rec. Ex. Tab 10 p. 19, emphasis added). The named Insured in the Policy was Lockwood. (Appendix 1 p. 1; Rec. Ex. Tab 10 p. 25). There are no "other insureds" or "additional insureds" in the policy nor any provision for such to be added. (*See generally* Rec. Ex. Tab 10 pp. 6-25). Since the Partnership is not the Insured, the expenses claimed by the Partnership are not covered by the above quoted language from the Policy.

The second provision relating to debris removal is found in the Pollution Endorsement. (Appendix 1 pp. 7-9; Rec. Ex. Tab 10 pp. 9-11). This provision states that the Policy also insures "expenses reasonably incurred in removal of debris of the property insured . . . and/or [the] cost of clean up, at the premises of the Assured." (Appendix 1 p. 8; Rec. Ex. Tab 10 p. 10). The debris removal provision in the Pollution Endorsement also contains two conditions precedent, one of which requires "that the Assured shall give notice to the Underwriters of intent to claim for cost removal of debris or cost of clean up . . . ." (*Id.*) While Kraft believes that the condi-

tions precedent have many other implications that relate to this Appeal, (*see infra*) the language which requires the Assured to give notice of intent to claim cost of removal is consistent with the intent expressed in the Debris Removal Clause in the main body of the policy that only expenses incurred by the Insured for debris removal are covered. It is a well established principle of insurance law that if possible the terms of the policy should be interpreted so as to give full effect to all the terms. *Cicciarella v. Amica Mut. Ins. Co.*, 66 F.3d 764, 768 (5th Cir. 1995).

The interpretation of the Policy argued by the Partnership which was accepted by the trial court changed the identity of who is an Insured entitled to assert a claim under the policy. Based on the trial court's ruling, anyone spending money for debris removal would be entitled to make a claim against the proceeds of the Policy. For example, if the Partnership had sold the building to a buyer "as is" with structural wreckage and debris of damaged personal property still on the premises, based on the trial court's ruling, that entity would be entitled to make a claim under the Policy for debris removal expense. Similarly, if a salvor had taken over damaged insured personal property in place, the trial court's ruling would entitle the salvor to assert a claim for debris removal expenses. The result in either of these examples would be ludicrous and would totally disregard the provisions in the Policy which identify the Insured and the Property Insured.

The trial court did not address who was an Insured in its opinion and Kraft believes that the condition precedent which refers to notice of intent by the Assured to make claim was not considered by the trial court. The coverage language in the Pollution Endorsement, when read in conjunction with the condition precedent in such

Endorsement and the Debris Removal Clause in the main body of the Policy, demonstrates that the Policy insured only expenses directly incurred by the Insured.

Under Texas law, "[i]t is the duty of the Court to construe the contract as an entire instrument, and to consider each part with every other part so that the effect and meaning of one part on any other part may be determined." *Smart v. Tower Land & Inv. Co.*, 597 S.W.2d 333, 337 (Tex. 1980). The portion of the policy first discussed above expressly states that only the expenses of the Insured are covered. The Pollution Endorsement, in requiring that the Assured notify the Underwriters that the Assured intended to claim against the policy for clean up expenses, implicitly makes the same requirement. Further, the endorsement excludes expenses incurred or ordered by any Government Agency, Court or other Authority. (Appendix 1 p. 9; Rec. Ex. Tab 10 p. 9). The Pollution Endorsement, in so limiting the coverage provided, is completely consistent with the requirement that expenses be incurred by the Insured (Assured) in order for coverage to be available. Since the Partnership's claim is for the expenses incurred by the Partnership, not Lockwood, the Partnership is not entitled to recover from the interpled fund and the trial court's award was incorrect.

B. The Interpled Proceeds of the Marine Policy Should be Applied First to Pay for Damage to Insured Personal Property, and Only After claims for Insured Personal Property Damage have been Satisfied, Should Any Remaining Policy Proceeds be Paid for Clean Up and/or Debris Removal Expense.

The Policy provided property insurance to Lockwood for the benefit of Lockwood and the owners of the insured personal property who stored their property with

Lockwood in the Building. (See Rec. Ex. Tab 10, pp. 6-25). Debris removal expenses are specifically referred tot only as an extension subject to the policy terms, conditions and limitations, and is clearly not the primary coverage provided. (Appendix 1 pp. 5, 8; Rec. Ex. Tab 10 pp. 10, 19). Furthermore, the policy limits are based on the reported values of stored property in the Building. (Appendix 1 pp. 4-5; Rec. Ex. Tab 10 pp. 20-21). While it is true that the value of goods declared to be present in the Building was woefully less than the actual value of the goods stored, this does not change the fact that the policy limits were intended primarily to compensate for the value of the personal property destroyed. The policy limits are specifically stated to not be enlarged by the language in the Debris Removal Clause. (Appendix 1 pp. 5, 8; Rec. Ex. Tab 10 pp. 10, 19). Since the conditions precedent in the Pollution Endorsement require that the Underwriters have either paid or agreed to pay for direct physical damage to insured personal property, it stands to reason that debris removal coverage is secondary, available only if there is coverage still available after all claims for damage to insured personal property have been paid.

By way of example, if a payment of the policy limits had been made by the Underwriters, the provision in the Debris Removal Clause which states that the policy limits would not be enlarged to provide debris removal coverage would govern and no payment for debris removal would be allowed. The only difference between an actual payment and an agreement to pay for direct loss to insured property in the condition precedent is that in the latter situation, where payment has not yet been made, it permits the insured to proceed with the submission and adjustment of debris removal expenses, but does not change the substantive requirement of a com-

mitment of policy proceeds to cover damage to insured personal property prior to debris removal expenses being recoverable. Thus, in the event of a partial loss, where the damage to insured property is less than total, a portion of the policy limits would be available to cover some or all of the debris removal expense. *See Henry v. American Concept Ins. Co.*, 498 N.W.2d 657, 660 (S.D., 1993).

In the case before this Court, Lockwood reported values significantly below the actual value of the personal property directly related to its business and over which it had care, custody, or control or for which it had contracted to provide insurance. Those goods were the primary object of this property insurance policy. The owners were persons with whom the insurance company could adjust the claims for damage. It was their property described in the "Property Covered" section of the policy. In this case these owners received only a fraction of the value of their destroyed goods. The unkindest part of the trial court's finding was that the trial court gave 12.42% of the already inadequate proceeds to a party clearly not insured under the policy for expenses that should be secondary and not recoverable until all the personal property damage was paid. That result was unfair, inequitable and inconsistent with the policy language.

C. The Evidence Presented to the Trial Court Did Not Contain Any Proof that the Condition Precedent in the Policy, Requiring Notice by the Insured of Intent to Claim for Debris Removal Expense, was Satisfied.

The district court erroneously awarded the Partnership a share of the proceeds of the Policy based on the language in the Pollution Endorsement regarding debris removal and clean up expense. (R. Ex. Tab 4 p. 2208).

The Pollution Endorsement, however, expressly required the Assured, to notify the insurer that it intended to make a claim for such expenses under the endorsement within twelve months of the fire. (Appendix 1 p. 5; Rec. Ex. Tab 10 p. 10). This provision was not addressed by the trial court when it made the award to the Partnership. The Policy named only Lockwood as the Insured. (*See generally* Rec. Ex. Tab 10 pp. 6-25). Other parties who may be entitled to receive policy proceeds are referred to in the Policy as "Loss Payees," (Rec. Ex. Tab 10 pp. 6-7), or "owner" (Appendix 1, p. 6; Rec. Ex. Tab 10 p. 18), never as "Insured." Thus, only notice of intent to claim by Lockwood satisfies the condition precedent.

No evidence of any such notice was presented to the trial court by the Partnership or any other party. (*See generally* Rec.) Thus, the Partnership failed to prove compliance with a condition precedent to the recovery for either debris removal or clean up expenses. A person seeking performance of an insurance contract must prove that all contractual prerequisites have been satisfied. *Harwell v. State Farm Mut. Auto. Ins. Co.*, 876 S.W.2d 494, 498 (Tex. App.—Fort Worth 1994), aff'd., 896 S.W.2d 170 (Tex. 1995). The award of the trial court was erroneous because the Partnership's claim failed to prove its right to recover under the Policy.

D. The Partnership Failed to Prove The Portion of its Claim That Was For Removal of Debris of Insured Property.

The two debris removal provisions of the Policy discussed above cover only the removal of debris covered under the policy. The first provision states, "This policy is extended . . . to cover the Insured's expenses incurred

in the removal of all debris **of the property insured hereunder** . . . ." (Appendix 1 p. 5; Rec. Ex. Tab 10 p. 19) (emphasis added). The second provision contained in the Pollution Endorsement, states, "[I]n the event of direct physical loss or damage **to the property insured hereunder,** this Policy . . . also insures . . . expenses reasonably incurred in removal of debris of the **property insured hereunder** destroyed or damaged from the premises of the Assured; . . . ." (Appendix 1 p. 8; Rec. Ex. Tab 10 p. 10) (emphasis added).

The trial court found that not all of the property destroyed in the warehouse fire was insured by the Policy. In fact it only allowed $2,671,947.95 to be considered as valuation for apportionment purposes notwithstanding the fact that the full value of all the damaged property was $17,572,653.50. The Partnership has claimed the entire cost of debris removal without differentiating between expenses for insured versus uninsured property. (Rec. Ex. Tab 11 pp. 1505-06). The portion of such expense that was incurred for the removal of the debris of property that was not insured under the Policy would not have been covered by the Policy, even if the claim had been submitted by the Assured.

The Partnership's proof fails to establish the portion of expenses related to removal of debris of insured property. In an interpleader action, each party claiming entitlement to the interpled funds has the burden of proof by a preponderance of the evidence to show its entitlement to the funds. *In re The Kelly Group, Inc.*, 159 B.R. 472, 476 (W.D. Va. 1993); *Midland Ins. Co. v. Friedgood,* 577 F.Supp. 1407, 1411 (S.D.N.Y. 1984). The Partnership is therefore not entitled to a share of the interpled fund because it has not carried the burden of proving its claim.

This issue was raised by Kraft in its initial objection to the Magistrate's findings and recommendations. In response to that objection, the Partnership pointed out to the Court that the Pollution Exclusion also provided for clean up costs, which argument was adopted by the trial court without any detailed analysis or opinion. However, both the affidavit of Martin Leibowitz, one of the partners of the Partnership and the affidavit of John Cherry, the debris removal contractor, identified the claimed expenses as debris removal rather than clean up.

Leibowitz - "The costs associated with the removal of this debris were $384,000." (Rec. Ex. Tab 11 p. 1505).

Cherry - "The costs associated with the removal of the debris of the property stored in the warehouse are approximately $384,000, which represents the costs of removing the material, transportation, and disposal." (Rec. Vol. 4 p. 1388).

No proof whatsoever was offered to support a claim for clean up costs, and thus the argument advanced by the Partnership's counsel in response to Kraft's objections is not supported by the evidence offered on behalf of the Partnership.

CONCLUSION AND PRAYER FOR RELIEF

Kraft has shown that the trial court's award to the Partnership was reversible error for four reasons:

1) The Partnership was not the Insured under the policy and only the Insured (Lockwood), if anyone, was entitled to recover clean up and debris removal expenses.
2) The debris removal and clean up expense extension of coverage was secondary to the coverage for damage to insured personal property and should not

have been considered until all claims for damaged personal property were satisfied.

3) There was no evidence in the record to demonstrate compliance with the condition precedent in the policy requiring the Assured to give notice of intent to claim clean up or debris removal expense within 12 months from the date of loss.

4) The evidence offered by the Partnership to support its claim for "clean up" expenses demonstrated that the expenses incurred were for debris removal of (1) [sic] Not withstanding the Appellee's brief and the court's opinion which referred to the expenses as "clean up expenses," the affidavits offered in evidence identify the expenses as being incurred for "debris removal." Furthermore, the debris removal expenses were for all the damaged personal property in the Building with no segregation between costs to remove insured versus uninsured personal property

For all of the foregoing reasons appellant would show that the award of the trial court to the Partnership was in error.

As the court may be aware from the docket sheet entries, Appellant filed a timely Motion for New Trial and for Stay of Execution of Judgment. During the pendency of that motion, and in violation of the Federal Rules the District Court Clerk's office in Houston errneously mailed out checks disbursing the interpled funds. However, this Court continues to have jurisdiction over the parties to whom the funds were disbursed.

The final judgment states only the percentage of the interpled funds to be received by each party without stating a dollar amount. Kraft believes that the Partnership received approximately $158,430.00 of the interpled

funds, plus accrued interest to the date of distribution in the amount of $15,193.00. Appellant requests that this Court reverse the trial court's ruling with respect to the award of funds to the Partnership, order that the Partnership take nothing, order the Partnership to return the awarded funds to the registry of the Court, together with accrued interest from March 15, 1996, the date Kraft believes the court distributed such funds, and order the trial court to distribute the returned funds to the other claimants who received an award of funds. Such a distribution should be made pro-rata on the basis of the recalculated percentage of recovery outlined in Appendix 2 attached to this brief.

If this Court should determine that parties who received a portion of the interpled funds but did not appeal the trial court's ruling are not entitled to an increased recovery, Kraft alternatively would ask the Court to reverse the holding of the trial court and order the Partnership to pay into the registry of the trial court in Houston for the benefit of Kraft the amount of $64,640.17 plus accrued interest from March 15, 1996, the date funds were disbursed by the Court. That amount represents Kraft's share of the funds awarded to the Partnership.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief For Appellants Maxwell House Coffee Company and Kraft General Foods, Inc. have been sent by United States certified mail, postage prepaid, return receipt requested, to the following counsel of record on this 12th day of August, 1996.

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[Appendix originally attached to Brief
Omitted In Printing]